NO. 91-428

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1991

PHILIP W. BARNES, COMMISSIONER OF TEXAS STATE BOARD OF INSURANCE, *et al.*
Petitioners,

v.

E-SYSTEMS, INC. GROUP HOSPITAL MEDICAL & SURGICAL INSURANCE PLAN, *et al.*
Respondents

REPLY BRIEF TO BRIEF FOR RESPONDENTS IN OPPOSITION

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Pursuant to Sup. Ct. R. 15.6, Petitioners respectfully file this Reply Brief to Respondents' Brief In Opposition.

1. A refund of taxes from the State Treasury under the rubric of "equitable restitution" is barred by the Eleventh Amendment in the absence of consent or abrogation of sovereign immunity regardless of the existence of any other remedy.

Respondents attempt to rewrite this Court's test of Eleventh Amendment abrogation since they know they cannot meet it. While claiming boldly that ERISA expressly abrogates the state's Eleventh Amendment immunity, Respondents point to no unequivocal statutory language providing that states or state agencies may be sued under ERISA; and there is none. Cf. ***Pennsylvania v. Union Gas Co.***, 491 U.S. 1 (1989). To "contemplate subjecting the states to suits in federal court" as "logical defendant[s]" is not enough. ***Dellmuth v. Muth***, 491 U.S. 223 (1989).

The Court has already determined that a refund of taxes from the State Treasury is barred by the Eleventh Amendment in the absence of consent to suit by the State. ***Ford Motor Co. v. Department of Treasury***, 323 U.S. 459 (1945). The Court has held specifically that merely styling a monetary award from the State Treasury as "equitable restitution" does not avoid the bar of the Eleventh Amendment. ***Edelman v. Jordan,*** 415 U.S. 651 (1974). "The term 'equitable restitution' would seem even more applicable to the relief

sought in that case, since the taxpayer had at one time had the money, and paid it over to the state pursuant to an allegedly unconstitutional tax exaction. Yet this Court had no hesitation in holding that the taxpayer's action was a suit against the state and barred by the Eleventh Amendment." ***Id.***, at 669. (***citing Ford***).

Additionally, Respondents suggest that the Court of Appeals' decision will have "only limited legal significance" because it "offers no supporting discussion." Res. Br., p. 21. One may well wonder how an issue of the Court's subject matter jurisdiction involving principles of federalism and the Constitution of the United States can simply disappear between the lines.[1] A decision which requires monetary relief from the State Treasury under a federal statute which has millions of potential plaintiffs can hardly have "limited legal significance".

A holding that the Eleventh Amendment does not apply if there is no state remedy would also be in sharp conflict with decisions in at least four other Circuits. ***See*** Pet. at p. 17 and authorities cited. In any event, the State has

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[1] "The State appeals, contending that the federal court lacked jurisdiction by virtue of the Tax Injunction Act, 28 U.S.C. §1341, and the eleventh amendment ... ." Pet. App., p. 2a. "Having concluded that ASTA is preempted by ERISA we need proceed no further." Pet. App., p.11a.

consistently maintained that its tax protest remedy is available and should be employed by Respondents to seek a refund of the ASTA taxes.[2]

2. The proper application of the Tax Injunction Act has nothing to do with the merits of any particular tax.

A court should not consider the merits of a case in order to determine its subject matter jurisdiction. Congress did not enact the Tax Injunction Act to keep state tax disputes out of federal court only when the state will clearly win on the merits. Issues of the Constitution, the principles of federalism and the intent of Congress in the Tax Injunction Act have significance far beyond the scope of this (or any) particular dispute. Respondents suggest that the "Court should not exercise its certiorari jurisdiction to resolve procedural questions that will not affect the ultimate outcome of the case". Res. Br., p. 8. Under this results driven theory, the Court could tolerate a criminal

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[2]If the State were more interested in money than in the integrity of its tax system, it could argue that the Eleventh Amendment bars any monetary award and *agree* that Respondents may bring their claim only under ERISA. The State does not and will not make this argument because the principles of constitutional federalism at issue in this case, which apply with special force to state tax administration, are far more important than any short term financial gain.

confession obtained by torture if the Court were reasonably sure that the Defendant was guilty.

In suggesting that the current dispute is only between the State and ERISA plans, Respondents also conveniently forget the scope of relief ordered by the district court. "IT IS FURTHER ORDERED that Defendant and his agents are enjoined from seeking, directly or indirectly, to collect from any of the Plaintiffs herein, any of the Plaintiffs' sponsoring employers, employee participants or their administrative service providers, the tax or any portion thereof imposed by Article 4.11A ... ." Pet. App., 53a - 54a. Thus, the State can not simply give the plans their money and file collection suits against the sponsoring employers or administrative service providers.

The State has not "changed its tune and essentially abandoned its defense of the statute on the merits *as applied to these plans*." Res. Br., p. 7. The State never wanted payment of the tax from the plans and trusts and has had some obvious difficulties because of their decision to pay a tax they did not owe.[3] At the same time

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[3]Respondents suggest that *they* "have been taken on a tour of the federal and state court systems". Res. Br., p. 14. Respondents acknowledge the State's construction of ASTA "that the employers, not the plans, were the taxpayers," and that "the State has argued that ERISA plans are not ASTA

the State does not concede that Respondents should get a refund of ASTA taxes paid by them. Under this theory any "taxpayer" could disrupt state tax administration and avoid the procedural protections which this Court has unanimously approved merely by having someone else pay its taxes. ***See McKesson Corp. v. Division Alcoholic Beverages and Tobacco, Dep't of Business Regulation***, 110 S.Ct. 2238 (1990).

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taxpayers." Res. Br., pp. 3, 13. Some Respondents, however, even changed the ASTA tax return forms in order to pay the tax from plan assets. Copies of portions of the exhibits to ***E-Systems'*** petitions in state court are being lodged with the Clerk for the convenience of the Court, along with the state court TRO and preliminary injunction orders and additional pages from the transcript of the state court hearing on the preliminary injunction. One of the Plaintiffs' witnesses at the September 12, 1988, injunction hearing testified that the ASTA tax was paid from plan assets "on advice of counsel" without contacting the State Board of Insurance. Hrg. Trans., pp. 110-111. Another testified that the decision to pay the tax from plan assets was made by the "main fiduciary of the plan". ***Id.***, p. 95. Respondents' claims of ERISA preemption are logically irreconcilable with their actions in paying a tax which does not apply "to the extent preempted by federal law" and which was never demanded from them. ASTA §4(c). Respondents, not Petitioners, questioned their standing in state court and the State's ability to provide a tax refund, and filed a federal suit after actually obtaining state injunctive relief. Respondents also do not say how Petitioners can make "equitable restitution" of taxes which were deposited into the registry of the state district court pursuant to their request. At this point it does not matter what was the basis for Respondents' actions. Nothing should distract the Court from the critical issues of federal jurisdiction and constitutional federalism which require this Court's decision.

3. To avoid the Tax Injunction Act, Respondents rely on an argument not relied on by the Court of Appeals.

In the judgment of the Court of Appeals, only ERISA's "preemption factor" prevented dismissal of Respondents' case under the Tax Injunction Act. No detailed examination of state tax law is necessary to resolve this case. Respondents claim that the *State* court ruled that they had no "plain, speedy and efficient remedy" Res. Br., p. 9. By granting a preliminary injunction, the State district court did not conclude that it could provide no remedy. The equitable power of Texas state courts is just as thorough as that of the federal district court.

When it comes to state tax remedies in Texas, Respondents have an embarrassment of riches. Respondents already had obtained a TRO and a preliminary injunction from state district court at the time they filed their federal suit. Indeed, under the Texas Tax Code, Respondents could have sought an injunction before anyone was required to pay the tax. TEX. TAX CODE ANN. §112.101, ***et seq.*** (West 1982). As taxes came due Respondents could have posted a bond or paid the tax into the suspense account where it would remain pending the outcome of the proceedings. The State also has never disputed that its tax protest remedy is available to Respondents as

the persons who paid the tax and filed the written protest. ***Bernard Hanyard Enterprises, Inc. v. McBeath***, 663 S.W.2d 639 (Tex. App. - Austin 1983, writ ref'd n.r.e.). Similarly, the refund provision in the protest statutes must be interpreted to actually provide a refund because of both the clear legislative intent and the constitutional requirement to do so. ***Id.; McKesson, supra.***; TEX. TAX CODE ANN. §112.060 (West 1982).

It is very important that this Court discuss the parameters of ERISA jurisdiction where states or state agencies are defendants, especially concerning state insurance regulation or taxation.[4] Only by clarifying ERISA jurisdiction as applied to suits against a state or state agency can the fifty states and the millions of persons affected by ERISA know

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[4]Respondents cite nothing in ERISA's history to show how their claim is similar to the Plaintiff in ***Taylor. Metropolitan Life Ins. Co. v. Taylor***, 481 U.S. 58 (1987). In fact the report cited in ***Taylor*** says nothing about a congressional intent to eliminate state tax claims based on ERISA preemption, but is solely concerned with actions "to recover benefits due under the plan, to clarify rights to receive future benefits under the plan and for relief from breach of fiduciary responsibility." H.R. CONF. REP. No. 1280, 93rd Cong., 2nd Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5106. "The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts ... ." H.R. REP. No. 533, 93rd Cong., 2nd Sess., *reprinted in* 1974 U. S. CODE CONG. & ADMIN. NEWS 4639, 4655.

where complaints can be brought and what relief may be obtained. This question, which was expressly left open as to tax claims by ERISA entities, needs to be answered. ***Franchise Tax Board v. Construction Laborers' Vacation Trust,*** 463 U.S. 1 (1983).

4. If, and only if, the Court determines that it has jurisdiction over this State tax dispute, the Court should consider whether ASTA is valid.

ASTA has not been repealed. The State contends, as it did in the courts below, that ASTA is valid under ERISA's insurance savings clause. 29 U.S.C.A. §1144(b)(2) (West 1955). ***Birdsong v. Olson***, 708 F.Supp. 792, 799-801 (W.D. Tex. 1989) ***appeal dismissed, sub. nom., Birdsong v. Wrotenbery***, 901 F.2d 1270 (5th Cir. 1990). ***See also E-Systems,*** Pet. App., p. 10a and Suggestion for Rehearing En Banc attached to Petitioners' Motion to Stay filed with Justice Scalia, Issue No. 3 and discussion pp. 12-14.

Excerpts from the preliminary injunction hearing, lodged with the Court, illustrate how the claims process works and the role of insurance companies and third party

administrators in that process.[5] The State should be allowed to exercise its traditional and specially recognized powers of regulation and taxation over persons in the insurance business since these powers are not limited by the deemer clause. 29 U.S.C.A. §1144(b)(2)(B) (West 1985); 15 U.S.C.A. §1011, *et seq.* (West 1976); ***Western & Southern Life Ins. Co. v. State Board of Equalization***, 451 U.S. 648 (1981). The federal injunction, issued to the plans, wrongfully blocks the State authority expressly preserved in ERISA.

In the interests of constitutional federalism and of justice this Court should grant the writ.

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[5]Federal ERISA regulations clearly anticipate rather than reject continuing State regulatory authority where ERISA benefits "are provided or administered by an insurance company, insurance service, or other similar organization." 29 C.F.R. §2560.503-1(c)(1), (g)(2) (1991).

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